

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ASOPURU OKEMGBO,

Plaintiff,

v.

WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Defendant.

NO: 12-CV-5119-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT is Defendant's Motion for Summary Judgment (ECF No. 24) and Plaintiff's untimely Motion for Summary Judgment (ECF No. 50).¹ This matter was submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

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¹ Plaintiff, appearing *pro se*, filed a motion for summary judgment (ECF No. 50) on January 17, 2014, 39 days after the deadline for dispositive motions.

1 BACKGROUND

2 *Pro se* Plaintiff Asopuru Okembgo, Ph.D., (“Plaintiff” or “Dr. Okembgo”)
3 alleges that Defendant violated his civil rights under Title VII of the Civil Rights
4 Act by wrongfully terminating him on the basis of race, national origin, and
5 religion. Defendant Washington State Department of Ecology (“Department”)
6 now moves for summary judgment on grounds that Plaintiff fails to establish a
7 prima facie case of discrimination; the Department had a legitimate,
8 nondiscriminatory reason for terminating Plaintiff’s employment; and Plaintiff
9 fails to show the Department’s proffered reason for terminating him was pretext
10 for discrimination. For the reasons explained below, the Court grants Defendant’s
11 motion.

12 FACTS²

13 Plaintiff Asopuru Okembgo, Ph.D., (“Plaintiff” or “Dr. Okembgo”) is a
14 chemist; president of a nonprofit corporation named Skills Development Mission
15 headquartered in Kennewick; and author of a book titled “Pop the Question, Get
16 Yes, Get Married,” a book concerning Christianity and marriage advice. Defendant

17
18 ² The facts are excerpted from the parties’ statements of fact and supporting
19 exhibits and are accepted as true, with noted exceptions, for the purposes of the
20 instant motion.

1 Washington State Department of Ecology (“Department”) hired Plaintiff as a
2 Chemist 3 in February 2008. ECF No. 25 at 1. Einar (“Ron”) Skinnarland
3 (“Skinnarland”), Waste Treatment Section Manager, was on the hiring committee
4 and became Plaintiff’s direct supervisor.³ *Id.* at 1, 3.

5 After Dr. Okembgo’s probation period had ended, three of Dr. Okembgo’s
6 co-workers, N.S., T.W., and A.C., alleged that Dr. Okembgo had engaged in
7 inappropriate touching and/or conversation with them.⁴ ECF No. 25 at 2;
8 Skinnarland Declaration at 3. As a result, on June 11, 2009, Skinnarland contacted
9 his supervisor, and Human Resources investigated the allegations. ECF No. 25 at
10 10-11; Skinnarland Declaration at 3; Declaration of Polly Zehm at 2; Declaration
11 of Wendy Holton at 2. The investigation focused on alleged violations of
12 Department sexual harassment and use of state resources policies. Holton
13 Declaration at 2. During the investigation, 25 people were interviewed, and
14 “captures” of Dr. Okembgo’s computer and internet use were examined.

16 ³ Dr. Okembgo states that Skinnarland did not want to hire him, preferring a
17 family friend, Dr. Eberlein—a claim that Defendant disputes. *See* ECF No. 45 at 2.
18

19 ⁴ The Court considers the details of these and future allegations of inappropriate
20 behavior in greater detail below.

1 On December 7, 2009, Polly Zehm, Deputy Director of the Department, sent
2 Dr. Okembgo a predisciplinary notice indicating that the Department was
3 considering taking disciplinary action against him and citing allegations of
4 inappropriate touching and conversations with female employees and inappropriate
5 use of state resources. ECF No. 25 at 12; Zehm Declaration at 2. After a meeting
6 with Dr. Okembgo and Department and Union representatives, Zehm sent Dr.
7 Okembgo a notice suspending him without pay from March 9, 2010, through
8 March 29, 2010.⁵

9 Dr. Okembgo's supervisor Skinnarland met with Dr. Okembgo before and
10 after his suspension, memorializing each of their discussions in writing in
11 memoranda entitled "Work Expectations." ECF No. 25 at 13. The resulting
12 memoranda indicate that Dr. Okembgo was prohibited from using work time to
13 promote, sell, or distribute his book on marriage, and from using work time to
14 counsel co-workers or offer to pray with them. *Id.*

15 After Dr. Okembgo's suspension and meetings with Skinnarland, the
16 Department hired S.N., who became seated in a cubicle close to Dr. Okembgo.
17 ECF No. 25 at 14; S.N. Declaration at 2. S.N. also reported a series of

18
19 ⁵ Defendant states that although the collective bargaining agreement allowed Dr.
20 Okembgo to grieve the decision, he did not file a grievance. ECF No. 25 at 13

1 uncomfortable interactions with Dr. Okembgo, which were reported to Human
2 Resources. ECF No. 25 at 18-19.

3 After receiving report of the new allegations against Dr. Okembgo, Human
4 Resources began another investigation focusing on the alleged violations of the
5 Department's sexual harassment policy, but more expansive, to include an inquiry
6 into whether Dr. Okembgo distributed his book on marriage and made offers of
7 counseling and prayer. *Id.* at 19. On March 22, 2011, Dr. Okembgo was sent
8 another pre-disciplinary notice informing him that the Department was considering
9 disciplinary action which included allegations of inappropriate behavior of a sexual
10 nature toward a female co-worker and failure to follow a supervisor's directive. *Id.*
11 at 20. Dr. Okembgo and Department and Union representatives attended his pre-
12 disciplinary meeting on April 1, 2011. On April 15, 2011, Human Resources sent
13 Dr. Okembgo a notice of dismissal informing him that he was terminated from
14 employment effective that day. ECF No. 25 at 20.

15 **A. The Sexual Harassment Allegations**

16 Dr. Okembgo disputes many of his four co-workers' substantive allegations;
17 however, he does not appear to dispute the fact that they made the allegations to
18 the Department. Each co-worker's allegations are as follows:

19 ///

20 ///

1 1. N.S.⁶

2 According to the Fact-Finding Inquiry Form summary resulting from Human
 3 Resources' investigation, N.S.'s allegations against Dr. Okembgo included the
 4 following:

- 5 • Unwanted hugging
- 6 • Bringing her Bible verses
- 7 • Coming into N.S.'s cubicle and standing very close to her
- 8 • Patting her on the shoulder sliding his hand down to just above her
 elbow, and pinching her—an action repeated three times

8 ECF No. 29-1, Exhibit D.

9 2. T.W.

10 According to the Fact-Finding Inquiry Form summary resulting from Human
 11 Resources' investigation, T.W.'s allegations against Dr. Okembgo included the
 12 following:

- 13 • Unwanted back rubs in her cubicle—a “couple”
- 14 • “Forced” hugging, in which Dr. Okembgo would grab her elbows and
 pull her to him for a hug—an estimated ten occasions
- 15 • “Pulling” her into a conference room to pray after she told him about
 a miscarriage

16 ECF No. 30, Exhibit E.

17 3. A.C.

18 According to the Fact-Finding Inquiry Form summary resulting from Human
 19 Resources' investigation, A.C.'s allegations against Dr. Okembgo included the

20 ⁶ The Court uses initials here to protect the privacy of the women involved.

1 following:

- 2 • Commenting on A.C.'s coat, which was hanging outside her cubicle. When she stated that it had stains from her young child's food, he said
- 3 that some stains have value, mentioning "Monica Lewinsky," and her "blue dress."
- 4 • After lunch with Mr. Okembgo, he told A.C. "Tell your husband not to worry. I won't take you away from him."

5
6 ECF No. 28, Exhibit C.

7 4. S.N.

8 According to the Fact-Finding Inquiry Form summary resulting from Human
9 Resources' investigation and her declaration, S.N.'s allegations against Dr.

10 Okembgo included the following:

- 11 • Giving S.N. his book on marriage, which includes discussion about ovulation.
- 12 • Asking personal questions about female reproduction.
- 13 • Asking when her body temperature changed and stating that he could sense when his wife's temperature changed.
- 14 • Asking if she was "early in her cycle," if she "knew how to tell," and if she had "a regular 28-day cycle."
- 15 • Stating in a conversation about getting pregnant, "You have to hold on until you get a full deposit."
- 16 • Standing close to her after she told him to clean his desk and stating "what will be my reward for cleaning my desk?"
- 17 • Repeatedly whispering her name from his cubicle.
- 18 • Telling S.N. that she should try to get pregnant over the weekend.
- 19 • Telling her he would pray for her over the weekend and making a gesture similar to holding a baby.
- 20 • Keeping a piece of candy S.N. had given him in a heart-shaped box and telling S.N. that it was special to him and he was keeping it in his heart.

- Stating that he could not look on the floor for a piece of candy S.N. had dropped because people would think he was looking between her legs.
- Suggesting that S.N. bring her husband's elastic exercise band to work because he could show her things her husband and she could do together with it.

Declaration of S.N., ECF No. 27; ECF Nos. 27-1 and 27-2, Exhibits A and B.

B. Other Allegations

The Department also claims that Dr. Okembgo misused state resources by using his email for personal emails and viewing large numbers of non-work-related internet sites. Though Plaintiff disputes at least some of these allegations, Human Resources Consultant Wendy Holton declared that a "capture" of Plaintiff's computer and internet use indicated that between April 28, 2009, and June 1, 2009, Dr. Okembgo had accessed 1,416 non-work-related websites. Holton Declaration, ECF No. 33. She also stated that between February 15, 2009 and July 1, 2009, he had sent or received 155 non-work-related emails, 44 of which appeared to be related to Dr. Okembgo's non-profit organization. *Id.*

Skinnarland also claims that Dr. Okembgo appeared to be spending time at the Washington State University library (a place where employees sometimes went for legitimate reasons) to work with students on his nonprofit corporation during work hours. ECF No. 32-4, Exhibit M. Skinnarland reported seeing Dr. Okembgo

1 come in late from lunch, take personal calls, and leave meetings to take personal
2 calls. *Id.*

3 **C. The Work Expectations Memoranda**

4 The Work Expectations memoranda provide, *inter alia*, the following
5 supervisory directives:

6 4) You are not to use your work time for any non-work activity, including:

- 7 • Promoting and soliciting contributions of money, time or other
8 donations for your non-profit organization or other non-work related
9 activities that you are involved in
- Promoting, selling and/or distributing your book on marriage
- Promoting religious opinions, providing religious information,
counseling, offers to pray

10 5) You are not to use your assigned state computer, work phone, copy
11 machine, fax machine or any other state equipment for any non-work related
activity.

12 ECF No. 32-5, Exhibit N. The other Work Expectation memorandum has
13 substantially the same provisions. ECF No. 32-6, Exhibit O.

14 **D. Procedural Background**

15 Through his union, Dr. Okembgo filed a grievance challenging his
16 discharge. ECF No. 25 at 21. An arbitration hearing was held on that issue and to
17 determine whether the Department violated the collective bargaining agreement
18 when it provided documents only to the union and not to Dr. Okembgo. *Id.* The
19 arbitrator determined that the Department and the Union agreed to a variance in the
20 collective bargaining agreement where in the Department only provided documents

1 to the union and not to Dr. Okembgo. *Id.* The arbitrator also determined that the
2 Department had just cause to dismiss Dr. Okembgo. *Id.* Dr. Okembgo maintains
3 that the Department failed to follow its own internal policies or the collective
4 bargaining agreement with the Union.

5 On September 10, 2012, Dr. Okembgo filed the action now before the Court,
6 alleging that the Department engaged in unlawful employment practices in
7 violation of Title VII of the Civil Rights Act by

8 subjecting [him] to disparate terms and conditions of employment
9 (allegations of sexual harassment, failing to follow due process during the
10 disciplinary hearing, issued management directive that violated my freedom
11 of speech rights; and supporting Ronald Skinnarland's, Section Manager,
12 efforts of intimidation, hostile work environment, wrote that I was predatory
toward women, undermining my standing at workplace), and by wrongly
terminating my employment on the basis of my Black/African/Nigerian/
Christian, race, national origin and religion.

13 ECF No. 1.

14 DISCUSSION

15 A. Legal Standard

16 Summary judgment may be granted to a moving party who demonstrates
17 "that there is no genuine dispute as to any material fact and that the movant is
18 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party
19 bears the initial burden of demonstrating the absence of any genuine issues of
20 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then

1 shifts to the non-moving party to identify specific genuine issues of material fact
2 which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.
3 242, 256 (1986). “The mere existence of a scintilla of evidence in support of the
4 plaintiff’s position will be insufficient; there must be evidence on which the jury
5 could reasonably find for the plaintiff.” *Id.* at 252.

6 For purposes of summary judgment, a fact is “material” if it might affect the
7 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any
8 such fact is “genuine” only where the evidence is such that a reasonable jury could
9 find in favor of the non-moving party. *Id.* In ruling upon a summary judgment
10 motion, a court must construe the facts, as well as all rational inferences therefrom,
11 in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372,
12 378 (2007). Only evidence which would be admissible at trial may be considered.
13 *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002).

14 **B. Plaintiff’s Discrimination Claims**

15 Plaintiff contends that he was discharged from his position as chemist
16 because of his race, national origin, and religion. Defendant argues that Plaintiff’s
17 claim fails because he does not establish a prima facie case of discrimination; the
18 Department of Ecology had a legitimate, non-discriminatory reason for terminating
19 Plaintiff; and Plaintiff fails to show that the Department’s proffered legitimate,
20 non-discriminatory reasons were merely pretext for discriminatory motives.

1 Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in
2 relevant part:

3 It shall be an unlawful employment practice for an employer ... to discharge
4 any individual, or otherwise to discriminate against any individual with
5 respect to his compensation, terms, conditions, or privileges of employment,
because of such individual's race, color, religion...or national origin....

6 42 U.S.C. § 2000e–2(a). Title VII claims are analyzed under the burden-shifting
7 analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
8 *See Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1105 (9th Cir. 2008). Under
9 the *McDonnell Douglas* burden-shifting analysis, a plaintiff must first establish a
10 prima facie discrimination case. *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115,
11 1123 (9th Cir. 2000). If the plaintiff establishes a prima facie case, the burden of
12 production, but not persuasion, then shifts to the defendant to articulate some
13 legitimate, nondiscriminatory reason for the challenged action. *Id.* at 1124. If the
14 employer does so, then the plaintiff must show that the employer's proffered reason
15 is merely pretext for a discriminatory motive. *Llamas v. Butte Cmty. Coll. Dist.*,
16 238 F.3d 1123, 1126 (9th Cir. 2001).

17 The Court notes that Plaintiff does not appear to allege that the Department
18 failed to accommodate his religious beliefs in violation of § 701(j) of Title VII. To
19 establish a prima facie case of discrimination under that theory, the plaintiff must
20 prove the following: 1) he had a bona fide religious belief, the practice of which

1 conflicts with an employment duty; 2) he informed his employer of the belief and
2 conflict; and 3) the employer discharged him because of his inability to fulfill the
3 job requirement. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir.
4 2004); *Berry v. Department of Social Services*, 447 F.3d 642, 655 (9th Cir. 2006).
5 Here, there is no suggestion that Plaintiff's behavior stemmed from a bona fide
6 religious belief, that he informed his employer of this belief, or that he was
7 discharged because he was unable to fulfil the job requirement. Accordingly, the
8 Court analyzes Plaintiff's claims as disparate treatment claims under Title VII.

9 **1. Whether Plaintiff Established a Prima Facie Case for Discrimination**

10 To make a prima facie case for discrimination under Title VII, Plaintiff must
11 offer evidence that "'give[s] rise to an inference of unlawful discrimination,' either
12 through the framework set forth in *McDonnell Douglas Corp. v. Green* or with
13 direct or circumstantial evidence of discriminatory intent." *Vasquez v. Cnty. of Los*
14 *Angeles*, 349 F.3d 634, 640 (9th Cir. 2003) (quoting *Cordova v. State Farm Ins.*
15 *Companies*, 124 F.3d 1145, 1148 (9th Cir. 1997)). In the absence of direct
16 evidence, under the *McDonnell Douglas* framework, Dr. Okembgo has the burden
17 of showing that (1) he is a member of a protected class; (2) he was qualified for his
18 position; (3) he experienced an adverse employment action; and (4) similarly
19 situated individuals outside his protected class were treated more favorably, or
20 other circumstances surrounding the adverse employment action give rise to an

1 inference of discrimination. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603
2 (9th Cir. 2004) (citing *Chuang v. University of Cal. Davis Bd. of Trs.*, 225 F.3d
3 1115, 1123 (9th Cir. 2000); *Lyons v. England*, 307 F.3d 1092, 1112-14 (9th Cir.
4 2002). This showing is minimal and need not even rise to the level of a
5 preponderance of the evidence. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th
6 Cir. 1994). But it must be more than “purely conclusory allegations of alleged
7 discrimination, with no concrete, relevant particulars.” *Peterson*, 358 F.3d at 603
8 (quoting *Forsberg v. Pac. Northwest Bell Tel. Co.*, 840 F.2d 1409, 1419 (9th Cir.
9 1988)).

10 A plaintiff can also establish a prima facie case of disparate treatment
11 without satisfying the *McDonnell Douglas* test if he provides evidence suggesting
12 that the “employment decision was based on a discriminatory criterion illegal
13 under the [Civil Rights] Act.” *Cordova*, 124 F.3d at 1148-49 (quoting
14 *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358
15 (1977)) (finding in lawsuit by a Mexican-American job candidate evidence of
16 discriminatory animus where hiring manager referred to another Hispanic
17 employee as a “dumb Mexican” and declared that he was hired because he was a
18 minority). Such derogatory comments can create an inference of discriminatory
19 motive. *Id.* See also *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995)
20 (fire chief's derogatory comments about Hispanics create inference of

1 discriminatory motive); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir.
2 1991) (supervisor's remarks indicating sexual stereotyping create inference of
3 discriminatory motive); and *Chuang v. University of California Davis, Bd. of*
4 *Trustees*, 225 F.3d 1115, 1128 (finding direct evidence of discriminatory motive
5 where state university official stated that “two Chinks” in the pharmacology
6 department were “more than enough” and the dean laughed in response).

7 Here, Plaintiff appears to allege direct discriminatory animus. First, he
8 indicates that Mr. Skinnarland and Ms. Singleton requested his dismissal based on
9 Plaintiff’s religious beliefs. *See* ECF No. 45 at 59 (“Both Mr. Skinnarland and his
10 ‘work wife’ Ms. Singleton cleared [sic] requested for dismissal of the plaintiff
11 based on the plaintiff’s religious beliefs. As was outline[d] on discussion of
12 material facts paragraphs 76 and 77.⁷ Their statements were very clear and need no
13 further discussion.”). Dr. Okembgo’s statement of facts includes these allegations:

14 It is fact Mr. Skinnarland pushed his discriminatory agenda when he wrote
15 Ms. Polly Zehm an email (Exhibit 19) recommending dismissal of Dr.
16 Okembgo based on religion. In Mr. Skinnarland’s email of 3/24/2011, he
wrote:

17 ⁷ This appears to be a mistake. Paragraphs 76 and 77 of Plaintiff’s statement of
18 facts excerpt a declaration of Kevin Leary, a Department of Energy Project
19 Manager for one of Dr. Okembgo’s projects. The excerpts concern Dr. Okembgo’s
20 professional qualifications and work demeanor. ECF No. 45 at 36.

1 “I believe the recurrence of the inappropriate behavior for which
 2 Asopuru has been previously disciplined in March 2010, and the
continued liability to Ecology that he poses if he is returned to our
 3 work place is sufficient reason to justify his termination.

4 [Dr. Okembgo]

- 5 i. Continues to be a major liability for the state for
 6 inappropriate behavior, both inside our office and in his
 7 interactions with the Department of Ecology and its
 8 contractors in his work as a regulator. This [] risk is
 9 demonstrated by Asopuru’s behavior with S.N., which
 10 started only a few months after he was suspended without
 11 pay for his previous inappropriate behavior. ‘
- 12 ii. [sic] Continues to promote his non-profit and his book
 13 despite disciplinary action and repeated written direction not
 14 to do so.
- 15 iii. Continues to promote religious opinions and provide
 16 unsolicited and unwelcome counseling to NWP staff and to
 17 people on the Hanford site who NWP regulates.

18 ...

19 Mr. Skinnarland further send [sic] another email originated by Ms. Deborah
 20 Singleton (Exhibit 20) on 3/28/2011 to Ms. Polly Zehm insisting that Dr.
 Okembgo should be dismissed on the bases of his religious opinion as
 follows:

“Asopuru sincerely believes that because of his religious beliefs, his
 advice is warranted and useful; regardless of whether it is requested or
 not.

I do not believe that his continued employment will offer much
assistance to me in completing the tasks and assignments charged to
 him. His inability to meet deadlines and work within a team are
 evidence of the challenges that lay ahead. His continued
communication of his religious beliefs and opinions to unsuspected
 staff could proof [sic] to be detrimental to the retention of good
 employees.”

1 Plaintiff's Statement of Facts, ECF No. 45 at 33-35, paras. 74-75 (emphasis in
2 Plaintiff's quotation).

3 Though not a strong argument for discrimination, Plaintiff's dispute of the
4 facts, taken in the light most favorable to him, are sufficient to preclude summary
5 judgment on Plaintiff's failure to make a prima facie case.

6 Additionally, under the *McDonnell Douglas* scheme, the Court notes that
7 there is at least a dispute of material fact as to whether individuals outside of
8 Plaintiff's protected class were treated more favorably. For example, Dr. Okembgo
9 states that pink Post-It Note hearts were placed around his cubicle, constituting
10 sexual harassment which was never investigated by Defendant. He appears to
11 claim that the alleged sexual harassment he received (evidenced by the pink Post-
12 Its) went uninvestigated by Human Resources, while Human Resources
13 overinvestigated the allegations against him. *See* ECF No. 45 at 54 ("Mr.
14 Skinnarland took it upon himself to contact female employees coercing them to
15 bring sexual harassment allegations against the plaintiff."), and ECF No. 45 at 57
16 ("The Plaintiff brought the attention of Management and the Union to the fact that
17 there was unwelcome posting of pink hearts in plaintiff's cubicle.... This was
18 particularly a harassment since the person who posted them did not identify
19 himself/herself. Management did not carry out any investigation.").

1 Plaintiff also argues that the Department's hiring of Dr. Elis Eberlein is
2 evidence of disparate treatment. The Court disagrees. Plaintiff sets forth in his
3 responsive statement of facts that, at the time Plaintiff was hired, Mr. Skinnarland
4 had wanted to hire another candidate, Dr. Eberlein. Plaintiff states that "Mr.
5 Skinnarland created a Chemist 3 position for Dr. Eberlein, a Microbiologist. He
6 was hired for that position." ECF No. 45 at 2. Plaintiff provides no evidence or
7 supporting declaration for this statement, which appears in his response to
8 Defendant's motion for summary judgment. In reply, Defendant points out that the
9 Department of Ecology hired Dr. Eberlein as a permanent chemist on July 1, 2009.
10 ECF No. 54 at 4, citing Skinnarland Declaration at 2:20-22. Dr. Eberlein's hiring
11 therefore took place more than nine months before Plaintiff's discharge. Thus,
12 there is no indication that Dr. Okembgo was terminated so that Dr. Eberlein could
13 have his job, or that Dr. Eberlein was treated differently than Dr. Okembgo with
14 respect to hiring decisions.

15 Proceeding under the facts viewed in a light most favorable to Plaintiff, the
16 Court assumes that Plaintiff has made out his prima facie case of discrimination.
17 Accordingly, the Court next considers whether the Defendant established
18 nondiscriminatory reasons for discharging Dr. Okembgo.

19 ///

20 ///

1 **2. Whether Defendant Established Nondiscriminatory Reasons for the**
2 **Challenged Action**

3 If the plaintiff establishes a prima facie case, the burden of production, but
4 not persuasion, then shifts to the defendant to articulate some legitimate,
5 nondiscriminatory reason for the challenged action. *Chuang*, 225 F.3d at 1124.
6 Here, through the introduction of admissible evidence, the Department can
7 articulate legitimate, non-discriminatory reasons for having discharged Dr.
8 Okembgo. In fact, the record is rife with compelling, non-discriminatory reasons
9 for discharging Plaintiff, particularly the repeated allegations of sexual harassment
10 by Dr. Okembgo. Defendant also cites Dr. Okembgo's alleged misuse of state
11 resources.

12 **a. Allegations of Sexual Harassment**

13 The Department's sexual harassment policy makes clear that the Department
14 "Does Not Tolerate Any Kind of Sexual Harassment in the Workplace." Dep't of
15 Ecology, Chapter 1: Executive Policy and Procedure, ECF No. 33-3, Exhibit S.
16 Furthermore, this prohibition extends to all employees, not just supervisors:

17 All Ecology employees must foster and maintain a work environment free
18 from any kind of sexual harassment and inappropriate behavior of a sexual
19 nature. Any employee who is found to be in violation of this policy may be
20 subject to disciplinary action, up to and including dismissal.

Id. The policy defines "inappropriate behavior of a sexual nature" as including

1 “written, graphic or verbal communication, including demeaning or offensive
2 comments, gossip, epithets, suggestions, jokes, slurs, or negative stereotyping
3 based on gender”; and “physical behavior such as unwelcome touching, standing
4 too close, cornering, leaning over, or repeated brushing against a person’s body.”
5 *Id.*

6 The undisputed evidence shows that the Department received multiple
7 complaints about Dr. Okembgo’s behavior in violation of the sexual harassment
8 policy. Dr. Okembgo was reported for repeated instances of physical invasions of
9 his female co-workers’ space. For example, two co-workers reported “unwelcome
10 touching,” including unwanted hugs and back rubs. *See* Declaration of T.W., ECF
11 No. 30; Declaration of N.S., ECF No. 29. T.W. reported that Dr. Okembgo pinched
12 the back of her arm three times. T.W. Declaration, ECF No. 30. Three women
13 reported that he would stand close to them in their cubicles. Dr. Okembgo was also
14 reported for inappropriate statements that made his female co-workers
15 uncomfortable. For example, A.C. reported his statements likening the food stains
16 on her coat to the infamous stains on Monica Lewinsky’s blue dress, and telling
17 her to tell her husband not to worry because he would not “take [her] away from
18 him.” A.C. Declaration, ECF No. 28 at 2. S.N. reported his repeated comments
19 about her fertility and possible pregnancy, including asking about her “cycle,”
20 telling her to “hold on until you get a full deposit,” and telling her she should try to

1 get pregnant over the weekend. S.N. Declaration, ECF No. 27. These occurrences
2 and statements fall squarely into “inappropriate behavior of a sexual nature”
3 prohibited under the sexual harassment policy, including “verbal
4 communication... offensive comments, ... suggestions” and “physical behavior
5 such as unwelcome touching, standing too close, cornering, leaning over, or
6 repeated brushing against a person’s body.” There is no suggestion that such a
7 prohibition on sexual harassment violates Mr. Okembgo’s rights; in fact,
8 discrimination based on sex, as can be evidenced by serious sexual harassment, is
9 one of the types of discrimination against which Title VII protects. *See Meritor*
10 *Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986).

11 Plaintiff makes mostly conclusory denials that these events occurred. But
12 what is undisputed is that these co-workers made the reports in question. Thus,
13 their reports give the Department ample cause to discharge Plaintiff, regardless of
14 Dr. Okembgo’s dispute of the reports’ accuracy. As Skinnarland stated, in a line
15 cited by Plaintiff, “the continued liability to Ecology that he poses if he is returned
16 to our work place is sufficient reason to justify his termination.” ECF No. 45 at 34.

17 **b. Allegations of Misuse of State Resources**

18 Under the Department’s policy, the private use of state resources is “Strictly
19 Prohibited” in certain circumstances, including “[a] use for the purpose of
20 supporting, promoting, or soliciting for an outside organization or group unless

1 provided for by law or authorized by an agency head or designee,” or
2 “[c]ommercial uses such as advertising or selling.” Dep’t of Ecology, Chapter 1:
3 Executive Policy and Procedure, ECF No 32-2, Exhibit R. These activities are not
4 subject to the Department’s *de minimus* use exception to the general prohibition on
5 private use of state resources. *See id.*

6 Plaintiff contends that the 44 emails about his nonprofit organization should
7 fall into the policy’s exception for nonprofit work. ECF No. 45 at 29. That
8 exception states that “employees may participate in fund-raising activities in a
9 state-owned or leased facility subject to the following conditions,” including that
10 “the activity is authorized by the Director.” ECF No. 33-2, Exhibit R. There is no
11 suggestion that Plaintiff had authorization from the Department in any way to use
12 state resources for work on his nonprofit organization. Thus, their inclusion as one
13 of the reasons the Department cited for terminating Mr. Okembgo appears
14 legitimate.

15 Plaintiff disputes much of Human Resources’ findings with respect to the
16 Department’s claims that he misused state resources. For example, Plaintiff
17 disputes that he visited 2,270 websites within 47 days, as Defendant alleges, and
18 that all of the non-work related sites were in fact not related to work. ECF No. 45
19 at 27-28. But this alone does not defeat summary judgment on this issue. He
20 acknowledges sending at least some non-work emails. These allegations compound

1 generally with the inappropriate behavior to his female-coworkers. Even viewed in
2 the light most favorable to Plaintiff, it is evident that he was discharged, not
3 because of his religious beliefs or race or national origin, but because he violated
4 the Department's sexual harassment and misuse of state resources policies, and
5 because he did so repeatedly, after warnings and discipline. Defendants have
6 consequently rebutted the presumption arising from Plaintiff's prima facie case,
7 and the burden returns to Plaintiff to show that his former employer's proffered
8 reasons for termination were merely pretext for an underlying discriminatory
9 motive.

10 **3. Whether Employer's Proffered Reasons Were Merely Pretext for**
11 **Discriminatory Motive**

12 To prevail on his employment discrimination claim, Plaintiff must show that
13 Defendant's proffered legitimate, non-discriminatory reasons for discharging him
14 were pretext for discriminatory animus. Plaintiff makes several arguments that the
15 Department's proffered reasons for termination were pretextual.

16 First, he states that "sexual harassment allegations were used as a ploy to
17 discriminate against the Plaintiff. Mr. Skinnarland set the stage, was the drum
18 beater, and got what he wanted—to dismiss the plaintiff since he had positioned
19 his family friend as his new chemist in his Section." ECF No. 45 at 58. Plaintiff
20 explains:

1 The defendant policy 1-32 on sexual harassment was not followed in
2 investigating and dismissing the plaintiff from his appointment. The policy
3 against sexual harassment was clear on what sexual harassment is supposed
4 to be. There was no place in which it stated that management should snooze
5 [sic] around asking whether employees felt comfortable around/about
6 another employee. However Mr. Skinnarland took it upon himself to contact
7 female employees coercing them to bring sexual harassment allegations
8 against the plaintiff.

9 ECF No. 45 at 54. This conclusory denial of the legitimacy of the claims and
10 further conclusory statement that Skinnarland “coerced” the women who alleged
11 his misconduct are insufficient to create genuine issue of material fact as to pretext.
12 The evidence shows no indication of coercion or trumping up complaints against
13 Dr. Okembgo. Dr. Okembgo points to the fact that several of the women were
14 reluctant to report him. *See* ECF No. 45 at 39, citing S.N.’ statement to
15 Skinnarland, Defendant’s Exhibit A. For example, he states that “[S.N.] was
16 pressured by Mr. Skinnarland to write a report and she reluctantly submitted an
17 information letter sent to Mr. Skinnerland and the HR.” *Id.* But S.N.’s statement
18 does not speak to her reluctance; rather she stated that she felt it was “important” to
19 make the Department of Ecology aware of these events.” ECF No. 27-1, Exhibit A.

20 Plaintiff additionally makes a conclusory statement suggesting that S.N.’s
report was coerced. ECF No. 45 at 55 (“Why was [S.N.] coerced into writing a
report that she was unwilling to do?”). But he offers no evidence that she was in
fact coerced or unwilling to write the report, other than suggesting that fear of her

1 superiors “might have been a possibility.” *Id.* However, such speculation is
2 insufficient to throw S.N.’s entire report into dispute. He also mentions that after
3 S.N. told him that she did not want to talk about morning sickness, he did not
4 pursue the conversation. *Id.* But he fails to mention the other eight allegations of
5 inappropriate behavior listed in her report. *See* ECF No. 27-1, Exhibit A.

6 Similarly, Dr. Okembgo cites another reference to T.W.’s reluctance to
7 report him. Again, however, the interview notes cited do not indicate coercion or
8 even real reluctance to report. *See* ECF No. 45, Plaintiff’s Exhibit 8 (“Initially,
9 [T.W.] did not want to be involved in a confrontation with management there and
10 Asopuru, she was uncomfortable with the idea. Later on, after additional
11 incidences in the hall, she changed her mind and we met...”). Reluctance to be
12 involved with an official investigation cannot be equated to reluctance to make a
13 report or coercion. T.W. in fact “changed her mind” after additional inappropriate
14 incidents.

15 Dr. Okembgo additionally cites a number of declarations of other
16 Department employees, stating that they had never had a problem with him or
17 noticed the alleged behavior. But the Court notes that evidence that Plaintiff did
18 not have problems with *some* co-workers is not evidence that Plaintiff did not have
19 problems with the co-workers who made allegations of inappropriate behavior.

1 Nor is it relevant that Dr. Okembgo is not the supervisor of the women
2 alleging the inappropriate behavior, as Dr. Okembgo argues. *See* ECF No. 45 at 54
3 (“Taken individually, [N.S.’s], [T.W.’s], and [S.N.’s] allegation of sexual
4 harassment does not stand the test of the plaintiff being their superior at work or
5 having authority to make any decisions in the work place. They, therefore, do not
6 have any basis of being afraid of telling the plaintiff that they were uncomfortable
7 with him or around him.”). The behavior the women reported violated the
8 Department’s sexual harassment policy, regardless of the relative status of the
9 individuals involved.

10 In short, Dr. Okembgo appears to have believed that Skinnarland had it out
11 for him, that Skinnarland went around the office asking women if they had a
12 problem with Dr. Okembgo, and that Skinnarland coerced women into making
13 untrue statements about Dr. Okembgo. But there is simply no evidence for this
14 conclusion. Skinnarland made inquiries into Dr. Okembgo’s behavior following
15 the allegations of harassing behavior; those inquiries necessarily involved asking
16 other women about their experiences with Dr. Okembgo.

17 Dr. Okembgo also states that Skinnarland created a Chemist 3 position for
18 one of the three candidates who was interviewed at the same time as Dr. Okembgo,
19 Dr. Eberlein. ECF No. 45 at 1. He contends that “Mr. Skinnarland had to hire Dr.
20 Eberlein because he had laid out his plans to get Dr. Okembgo dismissed from

1 working at Ecology.” ECF No. 45 at 2. He goes on to say “it was clearly evident
2 that the position of a Chemist was not needed,” citing an email from Alisa
3 Huckaby as proof that Skinnarland intended to replace Dr. Okembgo with Dr.
4 Eberlein.⁸ However, the email in question simply notes that Dr. Okembgo’s “work
5 deliverables” are those typically assigned to permit writers, and asking for
6 clarification and modification of the workscope associated with Dr. Okembgo, Dr.
7 Eberlein, and another chemist. ECF No. 45 at 67, Exhibit 1. Accordingly, this
8 conclusory allegation is unsupported and insufficient to create a dispute of material
9 fact for the purposes of summary judgment. Likewise, other statements regarding
10 Skinnarland’s attempts to sow discord, ask women if they were being harassed, or
11 attack Dr. Okembgo’s book are unsupported by any reference to supporting
12 material, such as a declaration. *See* ECF No. 45 at 3.

13 There is simply no indication that the people who made the decision to
14 discharge Dr. Okembo had any discriminatory motivation for doing so. To the
15 contrary, they were concerned about Dr. Okembgo’s repeated sexual harassment

16
17 ⁸ Defendant contends in its reply, to which Dr. Okembgo did not have an
18 opportunity to respond, that Dr. Eberlein was hired in July 2009, eight months
19 before any disciplinary action taken against Dr. Okembgo. ECF No. 54 at 4;
20 Skinnarland Declaration at 2.

1 and, to a lesser degree, Dr. Okembgo's misuse of state resources and time for his
2 nonprofit work and promotion of his book—all activities which expressly violated
3 Department policy.

4 For the reasons stated, the Court finds that Defendant provided legitimate
5 and nondiscriminatory reasons for discharging Plaintiff, and Plaintiff failed to
6 show that those reasons were pretext for discriminatory animus. Accordingly, the
7 Court grants Defendant's motion for summary judgment on this issue.

8 **C. Plaintiff's Allegations of First Amendment Violations**

9 Plaintiff contends in his opposition to Defendant's Motion for Summary
10 Judgment that "it is a discrimination for the defendant to make rules that conflict
11 with the Constitutional rights of a citizen" under the First Amendment of the U.S.
12 Constitution. ECF No. 45 at 60. He further argues that the defendant enacted an
13 official policy that interfered with his right to freedom of religion, and appears to
14 argue that restriction on sharing his book impinges on his freedom of speech. *Id.*
15 Plaintiff also cites *United States v. Means*, 627 F. Supp. 247 (D. South Dakota
16 1985), *rev'd in United States v. Means*, 858 F.2d 404 (8th Cir. 1988), for the
17 proposition that it is arbitrary and capricious when a policy denies freedom of
18 religion. *Id.* Plaintiff's complaint includes a request for relief from "Defendant's
19 trumping of [his] protected speech in the work environment." ECF No. 1 at 4.
20 Factual allegations in the complaint relating to speech consist of the following:

1 [Skinnarland] trampled on my right to freedom of expression by forbidding
2 the sharing of my thoughts during normal conversations with colleagues and
3 forbade giving my book to those who wanted to read it. He gave
management a directive that I should not use the word ‘pray’ when other
staffs [sic] were allowed to express their cultural values as they wished.

4 ECF No. 1 at 3.

5 **1. Freedom of Speech**

6 Based on Dr. Okembgo’s *pro se* complaint and response to Defendant’s
7 motion for summary judgment, the precise grounds under which he claims First
8 Amendment protections are unclear. However, the Court construes *pro se*
9 pleadings and responses liberally, and accordingly examines several possibilities.
10 One basis for protection is that Defendant’s memoranda were rules that infringed
11 on his freedom of expression. Another is that he was discharged for exercising his
12 First Amendment rights. The Court considers each in turn.

13 **a. Whether the Department’s Work Expectations**

14 **Memoranda Violated Dr. Okembgo’s First Amendment** 15 **Rights**

16 Defendant frames the alleged First Amendment violation as a restriction on
17 speech, applying the “public concern” test to measure whether the Department, as
18 a state agency, could impose certain restrictions on Dr. Okembgo.

19 Government employees do not relinquish all First Amendment rights
20 otherwise enjoyed by citizens just by reason of their employment. *Connick v.*

1 *Myers*, 461 U.S. 138, 142 (1983). But “a governmental employer may impose
 2 certain restraints on the speech of its employees, restraints that would be
 3 unconstitutional if applied to the general public.” *City of San Diego, Cal. v. Roe*,
 4 543 U.S. 77, 80, 82 (2004). When an employee speaks as a “citizen on matters of
 5 public concern” rather than as an “employee upon matters only of personal
 6 interest,” the Court will apply a balancing test. *Id.* at 83 (citing *Connick v. Myers*,
 7 461 U.S. 138, 143 (1983)). “Whether an employee's speech addresses a matter of
 8 public concern must be determined by the content, form, and context of a given
 9 statement, as revealed by the whole record.” *Id.* If the speech in question is a
 10 matter of public concern, the Court applies the *Pickering* balancing test, which
 11 evaluates “restraints on a public employee's speech to balance ‘the interests of the
 12 [employee], as a citizen, in commenting upon matters of public concern and the
 13 interest of the State, as an employer, in promoting the efficiency of the public
 14 services it performs through its employees.’” *Id.* (quoting *Pickering v. Board of*
 15 *Education of Township High School District 205 Will Cnty., Ill.*, 391 U.S. 563, 568
 16 (1968).

17 The January 27, 2010, Work Expectation memorandum’s provisions
 18 pertaining to free speech provide:

- 19 4) You are not to use your work time for any non-work activity including:
 20 • Promoting and soliciting contributions of money, time or other
 donations for your non-profit organization or other non-work related
 activities that you are involved in

- Promoting, selling and/or distributing your book on marriage
- Promoting religious opinions, providing religious information, counseling, offers to pray

5) You are not to use your assigned state computer, work phone, copy machine, fax machine or any other state equipment for any non-work related activity.

ECF No. 32-5 at 2, Exhibit N. The April 7, 2010, memorandum contains the same provisions. The memoranda, therefore, prohibit three specific expressive acts during work time: (1) promoting or soliciting for outside activities, including a nonprofit organization; (2) promoting, selling or distributing a book; and (3) promoting religion and religious beliefs and offering to pray.

Defendant contends that Dr. Okembgo's speech was not on a matter of public concern because it pertained to a subject of personal interest. ECF No. 54 at 8-9. While this is a close question, Plaintiff's speech—promotion of the nonprofit organization, his book, and his religion during work hours—constitutes a matter of public concern, contrary to Defendant's argument. "This circuit and other courts have defined public concern speech broadly to include almost *any* matter other than speech that relates to internal power struggles within the workplace." *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996); *see also Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989) ("Speech that can fairly be considered as relating to any matter of political, social, or other concern to the community is constitutionally protected."); *National Treasury Employees Union v. United States*, 990 F.2d 1271 (D.C.Cir. 1993), *aff'd in relevant part, rev'd in part*

1 *on other grounds*, 513 U.S. 454 (1995) (“The contrast, [between public concern
2 speech and non-public concern speech], then was between issues of external
3 interest as opposed to ones of internal office management. Accordingly, we read
4 the “public concern” criterion as referring not to the number of interested listeners
5 or readers but to whether the expression relates to some issue of interest beyond
6 the employee's bureaucratic niche.”). Here, under this broad standard and in the
7 light most favorable to Plaintiff, all three types of speech arguably concern social
8 matters or matters possibly of concern to the community, not “internal power
9 struggles within the workplace.” Insofar as selling his book or asking for donations
10 may be unprotected, the underlying speech about the cause the nonprofit
11 organization stands for, Plaintiff’s religious beliefs, and the subject matter of the
12 book are arguably matters of public concern; at minimum, they are not matters of
13 internal grievances. Thus, taken in the light most favorable to Plaintiff and under
14 the Ninth Circuit’s broad standard, all three types of speech are protected by the
15 First Amendment, and the Court moves to the next question in the analytical
16 framework.

17 Even where a public employee's speech implicates a genuine matter of
18 public concern, a public employer may still be justified in firing the employee.
19 *Nunez v. Davis*, 169 F.3d 1222, 1228 (9th Cir. 1999). In determining a public
20 employee's rights to free speech, courts must strike a balance “between the

1 interests of the [employee], as a citizen, in commenting upon matters of public
2 concern and the interest of the State, as an employer, in promoting the efficiency of
3 the public services it performs through its employees.” *Pickering*, 391 U.S. at 568.
4 “When someone who is paid a salary so that [he] will contribute to an agency's
5 effective operation begins to do or say things that detract from the agency's
6 effective operation, the government employer must have some power to restrain
7 [him].” *Waters v. Churchill*, 511 U.S. 661, 675 (1994). The employer's interest
8 outweighs the employee's interest in speaking on a matter of public concern if the
9 employee's speech “impairs discipline by superiors or harmony among co-workers,
10 has a detrimental impact on close working relationships for which personal loyalty
11 and confidence are necessary, or impedes the performance of the speaker's duties
12 or interferes with the regular operation of the enterprise.” *Rankin v. McPherson*,
13 483 U.S. 378, 388 (1987). In balancing these interests, a court must consider “the
14 manner, time, and place of the employee's expression.” *Id.*

15 Here, the memoranda prohibit three types of speech during work hours.
16 First, the memoranda prohibit “Promoting, selling and/or distributing your book on
17 marriage”—language suggesting that the Department was restricting commercial
18 activities related to the book. Defendant has a much greater interest in preventing
19 an employee from spending work time and state resources on selling a book than
20 the Plaintiff has in using those hours to sell the book, especially when there were

1 no restrictions on him doing so outside of work hours. Furthermore, the
2 Department, as a state agency, has an interest in maintaining the appearance of
3 independence from religion. Insofar as the book contained themes on Christianity
4 and marriage, as the evidence suggests, the Court notes that the Department has a
5 strong interest in maintaining the appearance of neutrality with respect to religion.

6 With respect to the Department's prohibition on "Promoting and soliciting
7 contributions of money, time or other donations for your non-profit organization or
8 other non-work related activities that you are involved in," the Court likewise finds
9 that the Department's interest in restricting these activities during work hours and
10 using work resources outweighs Plaintiff's interest. This is particularly so in the
11 context of the evidence that Dr. Okembgo had gone to the WSU library during
12 work hours to work with the students from his nonprofit organization, and that he
13 was receiving non-work emails regarding the nonprofit organization at his work
14 email address. The Department paid him to perform a public service as a chemist,
15 not to work on personal projects, however worthwhile and important. While Dr.
16 Okembgo disputes the extent of his email use, he does not dispute that there may
17 have been some use, and he does not appear to dispute that he spent time on his
18 nonprofit organization during work hours. As such, the Department's interest in
19 restricting activities that impede the employee's productivity weighs heavy in the
20 balance.

1 With respect to the last type of speech restricted under the memoranda,
2 “Promoting religious opinions, providing religious information, counseling, offers
3 to pray,” the Court again finds that the Department’s interest in promoting
4 “harmony among co-workers” and limiting impediments to “the performance of
5 the speaker's duties” and “the regular operation of the enterprise” outweigh the
6 Plaintiff’s interest. This is especially so given the context of the restrictions; this
7 particular restriction arose after a co-worker complained of being “pulled” into a
8 conference room to pray after a miscarriage, and another complained that Plaintiff
9 had repeatedly offered to pray for her fertility. The prayers, proffered religious
10 information, and offers of counseling were intertwined with the topics of
11 conversation Dr. Okembgo’s co-workers found uncomfortable discussing with
12 him: pregnancy and fertility. Furthermore, since the restriction was only on this
13 activity during work, the Department may have been concerned about Dr.
14 Okembgo’s use of work public space, such as the conference room, for these
15 impromptu prayers. Again, the Department’s interest in maintaining neutrality with
16 respect to religion is one more factor weighing in its favor.

17 Accordingly, the Court finds that the Department’s interest in maintaining a
18 workplace that is free of sexual harassment, does not promote a particular religion,
19 and which maintains some semblance of order and efficiency outweighs the
20

1 Plaintiff's interest in selling his book, promoting his religious beliefs, or running
2 his nonprofit organization, while he is supposed to be working.

3 **a. Whether Dr. Okembgo Was Discharged in Retaliation for**
4 **Exercising Protected First Amendment Rights**

5 In a closely related argument, Dr. Okembgo also may be claiming that he
6 was terminated for exercising his First Amendment rights.

7 "When a government employee exercises his protected right of free
8 expression, the government cannot use the employment relationship as a means to
9 retaliate for that expression." *Coszalter v. City of Salem*, 320 F.3d 968, 973-74 (9th
10 Cir. 2003). In order to state a claim against a government employer for violation of
11 the First Amendment, an employee must show (1) that he or she engaged in
12 protected speech; (2) that the employer took "adverse employment action"; and (3)
13 that his or her speech was a "substantial or motivating" factor for the adverse
14 employment action. *Coszalter*, 320 F.3d at 973-74 (citing *Bd. of County Comm'rs*
15 *v. Umbehr*, 518 U.S. 668, 675 (1996); *Nunez*, 147 F.3d at 874-75; *Hyland v.*
16 *Wonder*, 972 F.2d 1129, 1135-36 (9th Cir. 1992); *Allen v. Scribner*, 812 F.2d 426,
17 430-36 (9th Cir. 1987)).

18 The first question is whether Dr. Okembgo engaged in protected speech. To
19 be protected, as noted above, the speech must be on a matter of public concern, and
20 the employee's interest in expressing herself on this matter must not be outweighed

1 by any injury the speech could cause to “the interest of the State, as an employer,
2 in promoting the efficiency of the public services it performs through its
3 employees.’” *Waters*, 511 U.S. at 668 (quoting *Connick*, 461 U.S. at 142;
4 *Pickering*, 391 U.S. at 568).

5 Plaintiff does not clearly indicate what speech might be protected. The
6 complaint states that Defendant had forbidden him from sharing his “thoughts”
7 during “normal conversations” with co-workers; from giving his book to people
8 who wanted to read it; and from using the word “pray.” ECF No. 1 at 3.
9 Presumably at least some of the speech implicated by the Work Expectations
10 Memoranda is included in this description, such as discussions of religion, trying
11 to distribute his book, and solicitations for his nonprofit organization. However, as
12 noted above, the Department’s interest in maintaining an efficient and harassment-
13 free workplace outweigh whatever interest Plaintiff may have in carrying out those
14 activities during work hours.⁹ Insofar as there might be other protected speech at

15
16 ⁹ For example, the Supreme Court has indicated that Title VII's prohibition on
17 discrimination in the “terms, conditions, or privileges of employment” includes the
18 requirement that employers maintain a workplace where employees are free from
19 harassment based upon a protected status. *See Meritor Sav. Bank, FSB v. Vinson*,
20 477 U.S. 57, 65-66 (1986).

1 issue, the Court notes that it is ultimately immaterial because here, as discussed in
2 the Title VII context, the undisputed evidence overwhelmingly points toward the
3 repeated sexual harassment complaints against Dr. Okembgo as the motivating
4 factor in his termination—not retaliation for any form of protected speech. His
5 female co-workers made claims that he stood too close, made suggestive
6 comments, discussed pregnancy and fertility, hugged and touched them and
7 otherwise made them uncomfortable in violation of the Department’s sexual
8 harassment policy. In fact, the most extensive of these complaints took place after
9 Dr. Okembgo was first investigated for and warned about violation of the sexual
10 harassment policy. Furthermore, an investigation revealed evidence that Dr.
11 Okembgo was using work time for his nonprofit organization.

12 Accordingly, Plaintiff’s suggestion that he was terminated in retaliation for
13 protected speech fails.

14 **2. Freedom of Religion**

15 The Court next turns to Plaintiff’s allegations that the Department “enacted
16 an official policy that interfered with plaintiff’s right to freedom of religion.” ECF
17 No. 45 at 60. The Court first notes that this claim, raised in Plaintiff’s responsive
18 memorandum, is only obliquely referenced in the complaint, and Defendant did not
19 address it in its reply. Plaintiff cites *U.S. v. Means*, 627 F. Supp. 247 (1985), *rev’d*
20

1 *in U.S. v. Means*, 858 F.2d 404 (8th Cir. 1988), for the proposition that it is
2 arbitrary and capricious when a policy denies freedom of religion. *Id.*

3 Plaintiff has failed to establish that his right freely to exercise his religion
4 was substantially burdened by the government's action in this case. *Vernon v. City*
5 *of Los Angeles*, 27 F.3d 1385, 1393 (9th Cir. 1994) ([t]o show a free exercise
6 violation, the religious adherent . . . has the obligation to prove that a governmental
7 [action] burdens the adherent's practice of his or her religion by pressuring him or
8 her to commit an act forbidden by the religion or by preventing him or her from
9 engaging in conduct or having a religious experience which the faith mandates.
10 This interference must be more than an inconvenience; the burden must be
11 substantial and an interference with a tenet or belief that is central to religious
12 doctrine.) (citation omitted).

13 Insofar as Plaintiff claims relief under the Administrative Procedure Act ,
14 the Court notes that the Federal Administrative Procedure Act governs federal
15 agencies. Washington State Agencies, like the Washington State Department of
16 Ecology, are governed by the Washington Administrative Procedure Act, codified
17 at RCW 34.05. Having dismissed Plaintiff's federal discrimination and
18 constitutional claims above, the Court declines to exercise supplemental
19 jurisdiction over any possible pendent state law claims.
20

1 Because the parties do not brief or discuss any possible additional
2 infringement of Dr. Okembgo's right to free exercise of religion on other theories,
3 nor does Plaintiff make such claim in his Complaint, the Court will not further
4 consider such an argument here.

5 **D. Plaintiff's Further Allegations that Defendant Failed to Follow its**
6 **Policies**

7 Plaintiff again invokes the Administrative Procedure Act in his opposition to
8 Defendant's Motion for Summary Judgment when he claims that it is a violation of
9 the APA when an agency fails to follow its own policy. ECF No. 45 at 60. As
10 noted above, the Court again declines to exercise any supplemental jurisdiction
11 over possible pendent state law claims arising out of violations of state
12 administrative procedure rules.

13 **E. Plaintiff's Motion for Summary Judgment**

14 Plaintiff, appearing *pro se*, filed a motion for summary judgment (ECF No.
15 50) on January 17, 2014, 39 days after the deadline for dispositive motions
16 established in the Jury Trial Scheduling Order (ECF No. 22). Plaintiff has not filed
17 any motion to extend the deadline for dispositive motions or indicated any good
18 cause for the delay. Defendant objects to Plaintiff's motion as untimely and notes
19 that it merely presents arguments made in Plaintiff's response to Defendant's
20 motion for summary judgment. ECF No. 68. Regardless, because the Court grants

1 Defendant's motion for summary judgment on all claims, Plaintiff's untimely
2 motion is moot.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 1. Defendant's Motion for Summary Judgment (ECF No. 24) is

5 **GRANTED.**

6 2. Plaintiff's untimely Motion for Summary Judgment (ECF No. 50) is

7 **DENIED** as moot.

8 3. All other pending motions are **DENIED** as moot.

9 4. All pending hearings and the jury trial are **VACATED.**

10 The District Court Executive is hereby directed to enter this Order, provide
11 copies to counsel and Plaintiff at his address of record, enter judgment in favor of
12 Defendant Department of Ecology, and **CLOSE** the file.

13 **DATED** February 24, 2014.



A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge